FILE COPY

OCT 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913. No. 191.

LAURA ORMSBY AND D. B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED, *Petitioners*,

v.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

BRIEF FOR PETITIONERS.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

LAURENCE H. ELDREDGE,
C. BREWSTER RHOADS,
ROBERT T. McCRACKEN,
Attorneys for Petitioners.
1421 CHESTNUT STREET,
PHILADELPHIA, PA.

MONTGOMERY & McCRACKEN,
Of Counsel.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA

INDEX.

		PAGE
I.	OPINIONS OF COURTS BELOW	1
II.	STATEMENT AS TO JURISDICTION	2
III.	STATEMENT OF THE CASE	3
IV.	SPECIFICATION OF ERRORS	5
V.	ARGUMENT	6
	Summary	6
	Point A: It is a settled principle of conflict of laws that all questions bearing upon the nature and extent of a plaintiff's right to recover damages for a tort are determined solely by the substantive law of the state in which it was created	7
	Point B: Whether a right of action survives the death of a tortfeasor is a question of substance involving the extent of the injured person's right, and dealing with the fundamental question whether such person has any right of action at all after such death	12
	Point C: The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of respondent's right to maintain this action is in conflict with the decisions of this Court and of other Circuits	26

PAGE

Point D: The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of the survival of a cause of action for a tort is contrary to a subsequent decision of the Supreme Court of Pennsylvania..... 29

Point E: Upon a factual situation where the Supreme Court of Pennsylvania has held that a cause of action for a tort does not survive the tortfeasor's death, the Circuit Court of Appeals has interpreted the Survival Statute of Pennsylvania as permitting the cause of action to survive..... 30

VI. CONCLUSION..... 33

TABLE OF CASES CITED.

PAGE

A.

Atchison, &c. Rwy. *v.* Spencer (1927), 20 F. (2), 714. 28

B.

B. & O. R. R. *v.* Joy (1899), 173 U. S. 226..... 23
Bell *v.* Wabash (1932), 58 F. (2) 569..... 28
Bradford, etc. Co. *v.* Clapper (1932), 286 U. S. 145. 11
Buckeye *v.* Buckeye (1931), 203 Wis. 248.....14, 21

C.

Cuba R. R. Co. *v.* Crosby (1912), 222 U. S. 473..2, 9, 24

D.

Davis *v.* Mills (1904), 194 U. S. 451.....8, 9, 24
Davis *v.* R. R. (1887), 143 Mass. 301.....13, 17

E.

Eagle Point, The (1906), 142 Fed. 453..... 28

F.

Flynn *v.* New York &c. R. R. (1931), 283 U. S. 53.. 22
Forsyth *v.* Hammond (1897), 166 U. S. 506, 513-514. 2

H.

Hannah Nielsen, The (1921), 273 Fed. 171..... 27
Harrisburg, The (1886), 119 U. S. 199..... 22
Hawks *v.* Hamill (1933), 288 U. S. 52..... 32
Heredia *v.* Davies (1926), 12 F. (2) 500..... 27
Hyde *v.* Rwy. (1883), 61 Ia. 441.....14, 20

J.

Jarrett *v.* Wabash (1932), 57 F. (2) 669..... 28

L.

Long *v.* R. R. (1916), 238 F. 919..... 28

PAGE

M.

Martin *v.* B. & O. R. R. (1894), 151 U. S. 673..... 23
Martin *v.* Wabash R. R. (1905), 142 Fed. 650..... 23
Michigan C. R. R. *v.* Vreeland (1913), 227 U. S. 59.. 13
Mosby *v.* Manhattan (1931), 52 F. (2) 364..... 28

N.

Needham *v.* Railway (1865), 38 Vt. 294.....14, 18

O.

O'Reilly *v.* R. R. (1889), 16 R. I. 388..... 13
Orr *v.* Ahern (1928), 107 Conn. 174.....13, 15, 24

P.

Page *v.* United Fruit Co. (1925), 3 F. (2) 747..... 23
Phillips *v.* Grand Trunk Rwy. (1915), 236 U. S. 662. 22

R.

Rubenstein *v.* Williams (1932), 61 F. (2) 575..... 27

S.

Sanders' *v.* Louisville & N. R. Co. (1901), 111 Fed. 708 26
Schreiber *v.* Sharpless (1884), 110 U. S. 76..... 13
Scotland, The (1881), 105 U. S. 24..... 28
Sioux County *v.* National Surety Company (1928), 276 U. S. 238..... 32
Slater *v.* Mexican Nat. R. R. (1904), 194 U. S. 120.....2, 8, 21, 23
Spiller *v.* Atchison, etc. Rwy. (1920), 253 U. S. 117. 2
Spokane &c. R. R. *v.* Whitley (1915), 237 U. S. 487. 8
State *v.* R. R. (1876), 45 Md. 41..... 14
Sullivan *v.* Associated B. & D. (1925), 6 F. (2) 1000 13
Sullivan *v.* Nitrate &c. Co. (1919), 262 Fed. 371.... 27
Sumner, *et al. v.* Brown (1933), 312 Pa. 124..13, 14, 29, 31

PAGE

U.

U. S. &c. *v.* Greenwald (1927), 16 F. (2) 948..... 27

W.

Western Union Tel. Co. *v.* Brown (1914), 234 U. S. 542 8
Wood *v.* Compagnie (1930), 43 F. (2) 941..... 28

TEXTBOOKS CITED.

Dicey, Conflict of Laws (4th Ed.).....8, 10
Restatement of Conflict of Laws..... 13
Goodrich on Conflict of Laws..... 22

STATUTE CITED.

Pa. Act of June 7, 1917, P. L. 447, § 35 (b) as amended by the Act of March 30, 1921, P. L. 55..... 30
U. S. Judicial Code, Section 240 (a)..... 2

I. OPINIONS OF COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania. (R. 10-13) is reported in 3 F. Supp. 680. It was filed on September 24, 1931.

The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 17-24) is reported in 65 F. (2d) 521. It was filed on April 7, 1933.

II. STATEMENT AS TO JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (USCA, sec. 347).

2. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed is April 7, 1933 (R. 24).

3. The following cases sustain the jurisdiction of this Court:

Cuba R. R. Co. v. *Crosby* (1912), 222 U. S. 473;

Slater v. *Mexican National R. R. Co.* (1904), 194 U. S. 120;

Forsyth v. *Hammond* (1897), 166 U. S. 506, 513-514;

Spiller v. *Atchison, Topeka & Santa Fe Rwy.* (1920), 253 U. S. 117.

III. STATEMENT OF THE CASE.

This is an action in trespass to recover damages for personal injuries received by respondent in New York City, New York, on October 17, 1925, when a passenger elevator in which she was riding crashed to the basement because of the alleged negligence of Frank G. Ormsby, the owner of the building and a resident of Pennsylvania (R. 2, 3, 8). On June 14, 1926, Ormsby died (R. 2, 9). The respondent did not institute any suit for damages during Ormsby's lifetime (R. 7). Under the law of New York, her cause of action abated with Ormsby's death (R. 10, 19). On April 12, 1927, the present action was instituted against the petitioners, as executors of Ormsby's estate, in the United States District Court for the Eastern District of Pennsylvania (R. 1). Under the statutory law of Pennsylvania an action for damages for personal injuries can be maintained against the estate of a deceased tortfeasor (R. 18, 19).

In their affidavit of defense, petitioners pleaded that respondent's cause of action had abated with Ormsby's death (R. 6, 7). The District Court held that the extent of respondent's rights was to be determined by the substantive law of New York, where the injuries were received, and entered a judgment of non-suit for the reason that respondent had no cause of action under the law of New York at the time suit was instituted (R. 10-13, 16).

On appeal to the Circuit Court of Appeals for the Third Circuit, that court reversed the judgment and

held that the question whether respondent's cause of action survived Opnsby's death was to be determined under the survival statute of Pennsylvania, in which State the suit was instituted (R. 17-24).

On October 9, 1933, this Court granted *certiorari* to review the decision of the Circuit Court of Appeals.

IV. SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the United States District Court for the Eastern District of Pennsylvania, and in awarding a *venire facias de novo*.

2. The Circuit Court of Appeals for the Third Circuit erred in holding that the survival statute of the forum (Pennsylvania), governed the question whether the respondent's right of action survived the tort feasor's death, and that the *lex loci delicti* (New York) did not.

3. The Circuit Court of Appeals for the Third Circuit erred in holding that the survival statute of the forum gave the respondent a right to maintain the present action although under the *lex loci delicti* no such right existed when suit was instituted.

4. The Circuit Court of Appeals for the Third Circuit erred in not applying the principles clearly laid down in prior decisions of this Court as well as in its own decisions, and in the decisions of other Circuit Courts of Appeal.

V. ARGUMENT.

Summary.

Point A. It is a settled principle of conflict of laws that all questions bearing upon the nature and extent of a plaintiff's right to recover damages for a tort are determined solely by the substantive law of the state in which it was created.

Point B. Whether a right of action survives the death of a tortfeasor is a question of substance involving the extent of the injured person's right, and dealing with the fundamental question whether such person has any right of action at all after such death.

Point C. The decision of the Circuit Court of Appeals that the *lex loci delicti* does not govern the question of respondent's right to maintain this action is in conflict with the decisions of this Court and of other Circuits.

Point D. The decision of the Circuit Court of Appeals that the *lex loci delicti* does not govern the question of the survival of a cause of action for a tort is contrary to a subsequent decision of the Supreme Court of Pennsylvania.

Point E. Upon a factual situation where the Supreme Court of Pennsylvania has held that a cause of action for a tort does not survive the tortfeasor's death, the Circuit Court of Appeals has interpreted the Survival Statute of Pennsylvania as permitting the cause of action to survive.

POINT A.

It is a settled principle of conflict of laws that all questions bearing upon the nature and extent of a plaintiff's right to recover damages for a tort are determined solely by the substantive law of the state in which it was created.

The respondent, injured in New York, seeks damages from the tortfeasor's estate, he having died before any action was brought. Under the law of New York the death extinguished the respondent's cause of action. The District Court held that the question of survival was one of substance to be determined by the *lex loci*, and entered a non-suit (R. 16-13, 16). The Circuit Court of Appeals while agreeing that "The general rule of law declared in both text books and decisions is that substantive rights are determined by the law of the place where the tort was committed, * * *" (R. 18); and that "All the authorities agree that survivability of a cause of action is * * * not a question of procedure" (R. 19); nevertheless went on to hold that "Whether or not a cause of action survives, is, therefore, determined by the laws of the state where the action is brought and not by the laws of the state in which the injury was inflicted" (R. 19), and reversed the judgment of non-suit.

There can be no doubt as to the soundness of the principle that "substantive rights are determined by the law of the place where the tort was committed, the *lex loci delicti* * * *" (R. 18). The reason

for this principle is that inasmuch as the right has been created by the *lex loci*, it is necessary to look to that law to understand the nature and extent of the right and the limitations upon it: *Dicey, Conflict of Laws* (4th Ed.) 10, 1950; *Slater* v. *Mexican National R. R.* (1904), 194 U. S. 120; *Davis* v. *Mills* (1904), 194 U. S. 451, 454; *Spokane, &c. R. R.* v. *Whitley* (1915), 237 U. S. 487; *Western Union Telegraph Co.* v. *Brown* (1914), 234 U. S. 542.

The nature and extent of a common law right of action for personal injuries may be stated somewhat as follows: One who is himself free from contributory negligence and has not voluntarily assumed the risk is entitled to recover, during the lifetime of both parties, damages for personal injuries proximately caused by the actor's wilful, reckless, or negligent misconduct. The requirements that the one injured be free from contributory negligence, from voluntary assumption of risk, and that the recovery be obtained during the lifetime of both the injured person and the tortfeasor, all deal with the substantive question of how extensive is the right which has been given and what limitations have been imposed upon it. All these questions are governed by the *lex loci*.

In *Slater* v. *Mexican National R. R.* (1904), 194 U. S. 120, 126, this Court, speaking by Mr. Justice Holmes, said:

> "But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obliga-

tion, Smith *v.* Condry, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, **and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.** * * * Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught."

In *Davis* v. *Mills* (1904), 194 U. S. 451, 454, this Court again speaking by Mr. Justice Holmes, said:

"But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. Slater *v.* Mexican National Railroad, 194 U. S. 120."

In *Cuba R. R. Co.* v. *Crosby* (1912), 222 U. S. 473, 478-479, this Court, again speaking by Mr. Justice Holmes, said:

"But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. Slater *v.* Mexican National R. R. Co., 194 U. S. 120, 126. **The law of the forum is material only as setting a limit of policy beyond**

which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. American Banana Co. v. United Fruit Co., 213 U. S. 347, 356. See Bean v. Morris, 221 U. S. 485, 486, 487. That and that alone is the foundation of their rights. * * *

"We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. **The right to recover stands upon that as its necessary foundation.** It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it. The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold."

Therefore a plaintiff must show that at the moment of his coming into court he possesses a then existing right of action under the *lex loci: Dicey, Conflict of Laws* (4th Ed.), 22. All that the forum can do is to give extra-territorial jurisdiction to enforce an existing right of action. *Dicey*, supra, p. 10. If, when the plaintiff comes into court, he has no right of action under the *lex loci*, the forum cannot look to its own law to create a right of action for him. So firmly is this principle engrained that this Court has recently held that the refusal of the forum to

give effect to a substantive defense under the applicable law of another state subjects the defendant to irremediable damage, is reversible error, and where the defense arises under a statute, the refusal to recognize such defense is a violation of the full faith and credit clause of the Federal Constitution: *Bradford Electric Light Co.* v. *Clapper* (1932), 286 U. S. 145, 160. In that case Mr. Justice Brandeis said, at page 160:

> "But the Company is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another State. The right which it claims should be given effect is set up by way of defense to an asserted liability; **and to a defense different considerations apply.** Compare Home Ins. Co. *v.* Dick, 281 U. S. 397, 407, 408, 74 L. ed. 926, 933, 934, 74 A. L. R. 701, 50 S. Ct. 338. A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. **But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done.**"

Yet that is exactly what the Circuit Court of Appeals has done in the present case, only here the defense arises under the common law and not under a statute. The petitioners have a complete and substantive defense under the law of New York inasmuch as under that law the respondent's cause of

action had ceased to exist before this suit was instituted. Despite this defense the Circuit Court of Appeals held that the petitioners are subject to liability. We submit that the decision in this case is completely in conflict with the whole theory of conflict of laws which is that the forum will, within certain limits, give a remedy to one who comes to it with an existing right of action, which has been created elsewhere, but that the forum cannot create a right of action for him.

POINT B.

Whether a right of action survives the death of a tortfeasor is a question of substance involving the extent of the injured person's right, and dealing with the fundamental question whether such person has any right of action at all after such death.

At common law a right of action for personal injuries ceases to exist upon the death of either the one injured or the tortfeasor. *Actio personalis moritur cum persona.* Survival of such a right of action is dependent solely upon statute, and such statutes create a greater right than that known to the common law. It necessarily follows that the question of survivability is not one of procedure but is a matter of substance because it definitely bears upon the extent of the right of action given to the respondent under the law of New York. Indeed, in its opinion the Circuit Court of Appeals says: "All the authorities agree that survivability of a cause of action is * * * not a question of pro-

cedure." (R. 19.) If survivability is not a question of procedure it must be a matter of substance, and this Court has so held.

In *Schreiber* v. *Sharpless* (1884), 110 U. S. 76, 80, this Court speaking by Chief Justice Waite, said: "Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it." In *Michigan Central R. R.* v. *Vreeland* (1913), 227 U. S. 59, 67, this Court speaking by Justice Lurton, said: "The question of survival is not one of procedure, 'but one which depends on the substance of the cause of action.'"

The Circuit Court of Appeals for the Second Circuit has taken the same view: *Sullivan* v. *Associated Bill Posters* (1925), 6 F. (2), 1000, 1008.

As the question of survivability is one of substance, it, like all other matters of substance, is determined by the *lex loci delicti*. The *Restatement of Conflict of Laws (Proposed Final Draft No. 3)*, provides:

> **"Section 426. SURVIVAL OF ACTIONS.**
>
> **"Whether a claim for damages for a wrong survives the death of the wrongdoer or of the injured person is determined by the law of the place of wrong."**

Among the authorities in support of this statement are: *Sumner* v. *Brown* (1933), 312 Pa. 124; *Orr* v. *Ahern* (1928), 107 Conn. 174; *Davis* v. *R. R.* (1887), 143 Mass. 301; *O'Reilly* v. *R. R.* (1889), 16

R. I. 388; *Needham* v. *Railway* (1865), 38 Vt. 294; *State* v. *R. R.* (1876), 45 Md. 41; *Hyde* v. *Railway* (1883), 61 Ia. 441. *Cf. Buckeye* v. *Buckeye* (1931), 203 Wis. 248.

In *Sumner* v. *Brown* (1933), 312 Pa. 124, as in the case at bar, the plaintiff was injured in New York as a result of the tortfeasor's alleged negligence. The tortfeasor was killed in the accident, and thereafter his surviving partner died. Subsequent to this second death, suit was instituted in a Common Pleas court in Pennsylvania against the estate of the surviving partner of the original tortfeasor. A demurrer was filed to the statement of claim upon the ground that plaintiff had not averred that the law of New York provided for survival of the common law cause of action. The lower court entered a final judgment for the defendant on the demurrer, and this was affirmed on appeal by the Supreme Court. In his opinion Mr. Justice Linn said at page 127;

> "Unless the law of New York provided a right of action for the tort, none exists; without a right of action, the suit must fail; if a right exists, it must be pleaded: Usher v. West Jersey R. R. Co., 126 Pa. 206, 17 A. 596; LaBar v. N. Y. etc. R. R. Co., 218 Pa. 261, 67 A. 413. The provisions quoted from the partnership statute do not provide for the continuation of the common law liability for personal injury after death of the party liable. For the wrongful act of the partner who drove the car, the property of the partnership was answerable (in the words of the statute)

'to the same extent as' he was; but his common law liability had been terminated with his death: Moe *v.* Smiley, *supra*. But as agent for his co-partner, his tort likewise made the property of the partnership answerable, but this liability also terminated by the death of the surviving partner. **No right of action then remains.**"

In *Orr v. Ahern* (1928), 107 Conn. 174, there also arose the identical question presented in the case at bar. As in the case at bar, the plaintiff was injured in New York by the defendant's negligence. Before any action was commenced, the tort-feasor died. In Connecticut, as in Pennsylvania, the cause of action survived and could be maintained against the deceased person's executor or administrator. The plaintiff sued the administrator, just as in this case the respondent sued Ormsby's executors. In the lower court the defendant's demurrer to the complaint was sustained and judgment was entered for the defendant. On appeal, the judgment was affirmed. The opinion was written by the late Chief Justice Wheeler. In the opinion it is said at page 177:

> "The immediate question which we are called upon to decide is: Can a common-law action to recover damages for personal injuries suffered in New York be maintained in Connecticut against the personal representative of one whose negligence caused the injury, but who died before suit was brought?
>
> * * * * * * *

> "The argument of plaintiff's counsel centers upon their attempt to demonstrate that the question relates to the remedy and not to a substantive right, consequently the law of the forum governs, and whether the action survives is to be determined by that law. If the maintenance of this action depended merely upon the question of remedy, the result claimed must follow and the action survive, since the statute of the forum, Connecticut, so provides. The fallacy of this position is in its assumption that, under the common law of New York, the right of action for personal injuries was a substantive right existing wherever a like common-law right existed, which, though abated in the place of the wrong, would still exist in a foreign jurisdiction which had a survival statute and had obtained jurisdiction of the parties to the action after the abatement of the action in the State of origin. New York created the right of action for this wrong. The power which gave the right could take it away. **When, by its law, the death of the injuring person abated the right of action for this wrong, the right no longer existed in that jurisdiction, nor thereafter in any other jurisdiction.**"

The court further said at pages 180-181:

> "The right of action for plaintiff's injuries arose in New York and was extinguished at the death of the defendant's intestate, since there was no survival statute in existence there. Our own survival statute cannot revive the right of action which arose in New York and

had been extinguished, nor can it create a cause of action based upon a wrong occurring in the State of New York. It has no extra-territorial force."

In *Davis* v. *The New York, etc. R. R.* (1887), 143 Mass. 301, the plaintiff, as administrator, sued for a death negligently caused in Connecticut. By the the law of Massachusetts an action for personal injury survived to the administrator, and by the law of Connecticut it did not. The Court said at page 302:

> "The inquiry is therefore presented, whether a cause of action at common law, which dies with the person in the state where it accrued, not having been made there to survive by any statute, will survive under and by virtue of the statutes of survivorship of another state, so that, if jurisdiction is there obtained over the person or property of the defendant, judgment may properly be rendered against him or his property."

The court further said at page 306:

> "By the decease of the intestate, the cause of action at common law which she once had in Connecticut has there ceased to exist. It is for that state to determine what provision, * * * if any, shall be made in order to indemnify the estate of the intestate * * *. Our statute, permitting the survival of similar actions in this state, does not therefore apply.";

and again at page 303:

> "It must certainly be the right of each state to determine by its laws under what circumstances an injury to the person will afford a cause of action. If this is not so, a person who is not a citizen of the state, or who resorts to another state for his remedy, if the jurisdiction can be obtained, may subject the defendant in an action of tort to entirely different rules and liabilities from those which would control the controversy were it carried on where the injury occurred."

In *Needham v. Grand Trunk Railway* (1865), 38 Vt. 294, the decedent received injuries in New Hampshire and died three days thereafter. The plaintiff, as administrator of his estate, commenced an action pursuant to the statute in Vermont. The court held that no cause of action existed. The court said at pages 307-308:

> "It is conceded that the injury which caused the death of Needham was received, in the state of New Hampshire, consequently his cause of action accrued in that state. By the common law, the cause of action which accrued to the intestate in that state, is extinguished by his death. By the law of that state no right exists in the personal representative to recover for such injury, and if this action can be maintained under the provisions of the Act of 1847 or 1849, it must be upon the ground that our statutes have extra-territorial force. The fact that the intestate was a citizen of this state at the time of the injury is entirely

immaterial in the decision of this question. * * * Our statute **furnishes a remedy** where the cause of action accrued, without this state, **and is not discharged or extinguished, but still exists by the laws of the state where it accrued. * * * A cause of action, which by the rules of the common law is extinguished by the death of the party, is by such death fully discharged, unless the cause of action survives by force of some statute law of the state where the cause of action accrued.**"

The court said further at page 310:

"If the legislature of New Hampshire had survived the intestate's cause of action, then, doubtless, our statute would have given the plaintiff a remedy to enforce it. * * * In order to bring the intestate's cause of action within the provisions of the Act of 1847, we should be required to hold that our statute operates in New Hampshire so far that causes of action for bodily injury which accrue in that state, do not die with the injured person, but survive by force of our statute. If our statute had such operation and effect there, then it repeals the common law rule and renders it inoperative everywhere. But this cannot be the intent of our statute. **Its operation in respect to the right or cause of action,** is limited to matters **which occur within our own state.** All transactions occurring here, and liabilities for acts done here, are affected and governed by our local laws, but no such result follows transactions occurring in a different state or territory where those laws are entirely inoperative, and where **different rules** applicable to the subject may pre-

vail. We think it well settled that an action arising under a statute, and depending upon no common law rule, cannot be maintained where no such statute was in force, in the state or territory where the injury was inflicted."

In *Hyde* v. *Wabash, etc., Ry. Co.* (1883), 61 Iowa 441, an administrator brought an action, pursuant to an Iowa survival statute, for his testator's death, caused by injuries received in Missouri. The defendant demurred, on the ground that the declaration did not show what the Missouri law was, and the demurrer was sustained. The court said at page 443:

"The plaintiff contends that the question as to whether an action survives pertains to the remedy, and must be governed by the law of the place of the court. * * *

"But, in our opinion, there is a question involved deeper than one pertaining merely to the remedy. **Where a cause of action does not survive, it is to be treated the same as if it never arose.** The cause of action in this case arose, if anywhere, in Missouri, but, if it did not survive in Missouri and if the courts of that state would treat it as if it never arose, we think it would be improper for the courts of this state to treat it as if it did. An act which, done in Missouri, does not create a liability in that state, would not create a liability anywhere."

The same problem recently arose in Wisconsin upon a very different set of facts. In *Buckeye* v.

Buckeye (1931), 203 Wis. 248, the plaintiff was negligently injured by the defendant while in the state of Illinois. Thereafter suit to recover damages was started in Wisconsin. Sometime after the commencement of the action, but before trial, the plaintiff married the defendant. Both parties were domiciled in Wisconsin. By Illinois law the marriage extinguished the cause of action, but the Wisconsin law was otherwise. The Supreme Court of Wisconsin reversed the judgment for the plaintiff and dismissed the suit. In its opinion the court said at page 343:

> "If, as seems clear, the law of Illinois is to govern, both as to the creation and extent of defendant's liability, and if the liability so created is subject to discharge or modification by the law of Illinois, we see no escape from the conclusion that plaintiff's cause of action has been wholly extinguished by her marriage." * * *
>
> "It seems clear to us that, if plaintiff had prosecuted this suit in Illinois, she could not succeed. Her failure in the Illinois Courts **would not be grounded upon any rules peculiar to Illinois affecting remedy or procedure, but to the fact that her cause of action was completely extinguished. * * * We fail to see how her substantive rights can be any greater here than they would be in Illinois."**

In support of the position taken by the Court, it cited the case of *Slater* v. *R. R. Co.* (1904), 194 U. S. 120, which has already been considered in this brief.

It is conceded in the case at bar that under the law of New York the respondent had no right of action after Ormsby's death (R. 19). Thus the question of survival involves the question of the extent of the right originally given to the respondent by the New York law. Cases involving actions under death statutes furnish pertinent analogies. The problem is to determine the extent of this new statutory right and it is universally held that the time fixed by such a statute within which suit must be instituted is a limitation on the extent of the right, and after the time limit expires there is no right of action and no suit can be maintained anywhere: *The Harrisburg* (1886), 119 U. S. 199, 214; *Flynn* v. *New York, &c., R. R.* (1931), 283 U. S. 53; *Goodrich on Conflict of Laws*, 170, 171.

The same view has been taken with regard to the Hepburn Amendment which creates a right to recover a freight overcharge provided a complaint is filed within two years from the time the cause of action accrues: *Phillips* v. *Grand Trunk Ry.* (1915), 236 U. S. 662.

In the case at bar the law of New York gave the respondent a right to recover damages from Ormsby during his lifetime. The "during his lifetime" was a limitation on the extent of the substantive right, just as the period of limitation in a death statute, and when Ormsby died the respondent's right of action was completely extinguished, and there was nothing left on which she could maintain an action anywhere.

We submit that the decision of the Circuit Court of Appeals to the contrary is bad law on an important question of conflict of laws, and is in conflict with the Court's own statement that, "substantive rights are determined by the law of the place where the tort was committed. * * *" (R. 18); and with its further statement that "all the authorities agree that survivability of a cause of action is * * * not a question of procedure" (R. 19).

The Circuit Court of Appeals does not cite one pertinent decision in support of its decision. It relies upon four cases, each of which deals with the quite different question of reviving an existing law suit after the death of a party.

In *Baltimore and Ohio R. R.* v. *Jog* (1889), 173 U. S. 226, this Court held that the right to revive a pending suit upon the death of a party thereto was to be determined by the revival statutes of the forum and not by the law relative to revival in the jurisdiction where the cause of action arose. The same question was involved in the cases of

Martin v. *B. & O. R. R.* (1894), 151 U. S. 673; *Martin* v. *Wabash R. R.* (1905), 142 Fed. 650 (C. C. A. 7); and *Page* v. *United Fruit Co.* (1925), 3 F. (2d) 747 (C. C. A. 1), all of which cases are cited and relied upon by the Circuit Court of Appeals.

This Court has never intimated that these decisions are in any way in conflict with the view later expressed in *Slater* v. *R. R.* (1904), 194 U. S. 120, 126;

Davis v. *Mills* (1904), 194 U. S. 451, 454; and *Cuba R. R.* v. *Crosby* (1912), 222 U. S. 473, 478-79, upon which we relie. The Circuit Court of Appeals does not even refer to these later decisions, which govern the facts here presented.

We submit that the problem of revival is wholly distinct from the question of the survival of a cause of action. If a cause of action exists when a suit is instituted, there is at that time an existing right to compensation over which the court assumes jurisdiction. To use a simile, the plaintiff delivers into the hands of the forum a perfectly healthy, living child whose future will thereafter be determined by the forum. But where the cause of action has ceased to exist before any suit was brought, the forum can no more revivify the cause of action which has died with the decedent than it could raise the decedent himself from the dead.

This distinction was clearly perceived by the Connecticut Court in *Orr* v. *Ahern* (1928), 107 Conn. 174, and in discussing this difference, Chief Justice Wheeler said at page 176:

> "Had the plaintiff begun his action here before the death of the intestate, under this statute, after the death of the intestate, it would have been revived. When our court had assumed jurisdiction of a cause of action originating in New York, it was beyond the power of the State of its origin to destroy our jurisdiction of the action. The *locus delicti* determined the existence of the cause of action. The *locus fori* determined the remedy.

The place of the injury could not, by legislative or judicial action taken subsequent to our acquiring jurisdiction, take away our jurisdiction over the cause of action **which was good when we assumed it,** for that would give the place of the injury an extra-territorial right to control litigation here. Neither would the death of the defendant's intestate pending the action have deprived our court of the right, upon proper application, to have revived the action, since our statute gives our court that right.

"The decisions upon this point are in very substantial accord, resting upon the reason upon which the pending action for personal injuries rests. Baltimore & Ohio R. Co. *v.* Joy, 173 U. S. 226, 19 Sup. Ct. 387."

He then went on to say at page 178:

"A survival statute is supreme within the bounds of its own State; beyond these its power of operation is not only ineffective but nonexistent. A statute of revival operates differently. It does not revive a right of action which has ceased in its place of origin; it revives an action for a right which arose in a foreign jurisdiction, but while the right still existed in that jurisdiction the action to secure the right was begun in another forum. The right which the action thus sought to secure **became a right in the jurisdiction of the forum as soon as its courts had assumed jurisdiction of it.** No state could subsequently, by legislation or rule of law, destroy, control, or affect in slightest degree that right. **It then existed by force of the law of the forum."**

POINT C.

The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of respondent's right to maintain this action is in conflict with the decisions of this Court and of other Circuits.

The Circuit Court of Appeals held that whether the respondent's right of action survived Ormsby's death was to be determined under the survival statute of the forum and not by the law of New York where respondent was injured. It said:

> "Whether or not a cause of action survives, is, therefore, determined by the laws of the state where the action is brought and not by the laws of the state in which the injury was inflicted" (R. 19).

It said again:

> "The test of a survival of an action depends upon whether or not it comes within the terms of the statute in the state where suit is brought" (R. 23).

This is contra to and in conflict with the decision of the Sixth Circuit in *Sanders'* v. *Louisville & N. R. Co.* (1901), 111 Fed. 708, which was decided by then Judge Lurton. As stated in the syllabus the court held: "The question whether a cause of action created by a state statute survives the death of the plaintiff, or of the person for whose benefit it is given, is one of right, and not of procedure, and is governed by the statutes of the state giving such right of action."

It is also contra to and in conflict with the decision of the Second Circuit in *U. S. &c.* v. *Greenwald* (1927), 16 F. (2) 948, 950.

We submit that the decision of the Circuit Court of Appeals is also in conflict with the decisions of this Court, already referred to, which hold that survival is a question of substance and that all such questions must be determined by the *lex loci.*

Under the law of New York the respondent has no right of action and the petitioners are under no liability to her. In reversing the judgment of nonsuit the Circuit Court of Appeals is necessarily deciding that the law of New York does not and the law of the forum does govern the question of the respondent's right and the petitioners' liability. This is contrary to and in conflict with many decisions of this Court and other Circuits, including the following:

Heredia v. *Davies* (1926), 12 F. (2) 500, C. C. A. 4, holding that the right to maintain the action is governed by the *lex loci.*

The Hanna Nielsen (1921), 273 Fed. 171, cert. den., 257 U. S. 653, C. C. A. 2, holding that the *lex loci* governs the right to recover, and it must be proved.

Sullivan v. *Nitrate &c. Co.* (1919), 262 Fed. 371, C. C. A. 2, holding that the law of the forum does not determine the right to recover.

Rubenstein v. *Williams* (1932), 61 F. (2) 575, Ct. of A. D. C., holding that the right to recover is governed by the *lex loci* and not by the *lex fori.*

Mosby v. *Manhattan* (1934), 52 F. (2) 364, 368, cert den., 284 U. S. 677, C. C. A. 8, holding that the *lex loci* governs all questions of defenses.

The Scotland (1884), 105 U. S. 24, 29, holding that the liabilities of the parties to an action are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. Accord: *Jarrett* v. *Wabash* (1932), 57 F. (2) 669, 671, cert. den., 287 U. S. 627, C. C. A. 2.

The Eagle Point (1906), 142 Fed. 453, cert den., 201 U. S. 644, C. C. A. 3, holding that a rule which limits liability deals with substance and not with procedure.

Atchison, &c. Ry. v. *Spencer* (1927), 20 F. (2) 714, C. C. A. 9, holding that the question of the effect of contributory negligence is governed by the *lex loci*. Accord: *Long* v. *R. R.* (1916), 238 Fed. 919, C. C. A. 4.

Wood v. *Compagnie* (1930), 43 F. (2) 941, 942, C. C. A. 2, saying that a limitation on a right of action is observed everywhere.

Bell v. *Wabash* (1932), 58 F. (2) 569, 572, C. C. A. 8, holding that a state statute cannot recreate a right, given under a Federal statute, that has ceased to exist by the very terms of the statute, because the liability itself is destroyed.

None of the foregoing cases involves the identical factual situation presented in the case at bar. But they all deal with the extent of and the limitations on a plaintiff's right of action, and they all hold that

such questions are governed by the *lex loci*. In the present case the New York law gave the respondent a right of action with the limitation that it must be asserted by suit and a recovery had during the lifetime of Ormsby. We submit, therefore, that the Circuit Court of Appeals in the case at bar in holding that this limitation did not control but that the law of the forum determined the extent of and the limitations upon respondent's right of action, has held contra to and in conflict with the decisions of this Court and of the other Circuits whose decisions have been cited.

POINT D.

The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of the survival of a cause of action for a tort is contrary to a subsequent decision of the Supreme Court of Pennsylvania.

The decision of the Circuit Court of Appeals was handed down on April 7, 1933 (R. 24). Subsequent thereto, and on May 22, 1933, the Supreme Court of Pennsylvania handed down its decision in the case of *Sumner* v. *Brown, Executrix, etc.*, 312 Pa. 124, in which that court held that a suit to recover damages for injuries inflicted in New York could not be instituted in Pennsylvania after the death of the tort-feasor. The facts of that case are set forth on page 14 of this brief. That decision is squarely contra to the decision in the case at bar.

We submit that this conflict between the decision of the Supreme Court of Pennsylvania and that of the Circuit Court of Appeals should not be permitted to stand. The question whether or not a cause of action survives is one in which the Federal courts should follow the law as laid down by the highest appellate court in the State. A defendant's liability should not be dependent upon so fortuitous a circumstance as whether the plaintiff can institute his suit in the United States District Court in Pennsylvania.

We submit that for this reason alone this Court should reverse the decision of the Third Circuit Court of Appeals, and thus bring the law into harmony with the law in Pennsylvania and the great weight of authority elsewhere.

POINT E.

Upon a factual situation where the Supreme Court of Pennsylvania has held that a cause of action for a tort does not survive the tortfeasor's death, the Circuit Court of Appeals has interpreted the Survival Statute of Pennsylvania as permitting the cause of action to survive.

In its opinion the Circuit Court of Appeals cites the Pennsylvania Survival Statute, which is the *Act of June 7, 1917, P. L. 447, Section 35 (b)*, as amended by the *Act of March 30, 1921, P. L. 55; 20 P. S. §772* (R. 19). The Court said:

> "In the case at bar, the legislature of Pennsylvania has provided that an action survives the death of the tortfeasor and may be maintained

> against his executors, if it could have been maintained against him if he had lived * * *. In the instant case, suit could have been brought against Ormsby if he had lived. Therefore, it may be maintained against his executors for it complies with the requirements prescribed by the legislature" (R. 23-24).

The Circuit Court of Appeals, therefore, interpreted the Pennsylvania statute as giving the respondent injured in New York the right to maintain an action in Pennsylvania after the tortfeasor's death. We submit that this interpretation by the Circuit Court of Appeals of a local statute is contrary to the recent decision of the Supreme Court of Pennsylvania in *Sumner* v. *Brown* (1933); 312 Pa. 124. In the opinion of the Supreme Court of Pennsylvania, it nowhere refers to the Act of March 30, 1921, but its very silence upon that point is in effect a decision that the act does not apply where the plaintiff was injured in another jurisdiction; and that the act cannot be interpreted to give one injured in New York the right to maintain an action in Pennsylvania subsequent to the tortfeasor's death. Substantially, therefore, the decision of the Circuit Court of Appeals interprets a local statute in Pennsylvania to give a plaintiff the rights which the Supreme Court of Pennsylvania subsequently held a plaintiff does not have, and the decision of the Circuit Court of Appeals upon the interpretation of a Pennsylvania statute, accordingly, is in conflict with and contrary to the decision of the

Supreme Court of Pennsylvania upon the same matter. This Court has frequently assumed jurisdiction to review and reverse a decision of a Circuit Court of Appeals upon the interpretation of a state statute which is in conflict with the decision of the highest appellate court of that state: *Sioux County* v. *National Surety Company* (1928), 276 U. S. 238; *Hawks* v. *Hamill* (1933), 288 U. S. 52.

In the Sioux County case Mr. Justice Stone said at page 240:

> "The correctness of this interpretation of the Nebraska decisions is questioned here, but all doubts on that point have been set at rest by a later decision of the state court. In Scotts Bluff County *v.* First Nat. Bank, 115 Neb. 273, decided since the entry of judgment below, the Supreme Court of Nebraska held that the statute does not have the effect asserted, and that within the amount of the bond a county may recover from the surety the full amount of the deposit even though it exceed fifty per cent of the authorized capital of the depository.
>
> **"We accept this construction of the statute and accordingly set aside the conflicting interpretation of the court below, even though it antedated the determination by the state court."**

VI. CONCLUSION.

In view of the foregoing we respectfully submit that the decision of the Circuit Court of Appeals is contra to the decisions of this Court, of other Federal Courts, of the various State Courts including the Supreme Court of Pennsylvania, is contra to the Restatement of Conflict of Laws, and is opposed to and inconsistent with all established principles of conflict of laws.

Accordingly, the decision of the Circuit Court of Appeals should be reversed and the judgment of nonsuit which was entered by the District Court reinstated.

Respectfully submitted,

LAURENCE H. ELDREDGE,
C. BREWSTER RHOADS,
ROBERT T. MCCRACKEN,
Attorneys for Petitioners.

MONTGOMERY & MCCRACKEN,
Of Counsel.